Sykel Enterprises, Inc. *and* Local 819, International Brotherhood of Teamsters, AFL–CIO. Case 2–CA–29163

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 29, 1997, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief, and the General Counsel and the Charging Party filed responding briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge found that the Respondent violated Section 8(a)(5) of the Act when it failed to pay a Christmas bonus to its employees in December 1995,[3] as it had done the previous 4 years. Having credited the testimony of the General Counsel's witnesses over that of the Respondent's main witness, Mark Portnoy, the judge found no support for the Respondent's contention that the Union waived its right to bargain over the issue of Christmas bonuses. The judge's analysis did not, however, include an explicit finding concerning the credibility of one other witness of the Respondent, Bonnie Santosus. We find that, even if credited, Santosus' testimony would be insufficient to establish that the Union had waived its right to bargain over the Christmas bonuses.

Santosus testified that she was present at a November 2 negotiation session between the Respondent and the Union. According to Santosus, the Union's attorney, Nathaniel Charny, stated at that session that he expected the Respondent to pay the Christmas bonus that year. The Respondent's representative at the negotiations, Mark Portnoy, asked if that was a formal demand, and Charny replied, ''[N]o, I don't expect an answer.''

This testimony fails to show that the Union received notice by the Respondent of an intent to change its past practice of giving Christmas bonuses. In the absence of clear notice of an intended change, there is no basis to find that the Union waived its right to bargain over the change. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); *Fountain Valley Regional Hospital*, 297 NLRB 549, 551 (1990), enfd. 935 F.2d 275 (9th Cir. 1991). Accordingly, we find that regardless of whether Santosus was credited by the judge, the record fails to show a waiver of the Union's right to bargain over the issue of Christmas bonuses, and thus the failure to pay the bonuses in 1995 was violative of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sykel Enterprises, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

''(a) On request, bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of all the employees in the appropriate unit, which is:

> All full-time and regular part-time shipping, receiving and production employees and excluding all executives, office workers, salesmen, confidential employees, foremen, guards, professional employees and supervisors as defined in the Act.''

2. Substitute the following for relettered paragraph 2(c).

''(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount due under the terms of this Order.''

3. Substitute the following for relettered paragraph 2(d).

''(d) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall also modify the judge's recommended Order to include the affirmative bargaining language that is set forth in the judge's recommended notice.

[3] All dates are in 1995 unless otherwise stated.

its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 28, 1996.''

Katherine L. Schwartz, Esq. and *Donald Zavelo, Esq.*, for the General Counsel.
Mark Portnoy and *Allen Pearl, Esqs. (Portnoy, Messinger, Pearl & Associates)*, for the Respondent.
Nathaniel K. Charny, Esq. (Cohen, Weiss & Simon), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on February 27, 1997, in New York, New York. The complaint, which issued on June 27, 1996, and was based on an unfair labor practice charge that was filed on February 28, 1996,[1] by Local 819, International Brotherhood of Teamsters, AFL–CIO (the Union), alleges that Sykel Enterprises, Inc. (the Respondent) violated Section 8(a)(1) and (5) of the Act in December by unilaterally discontinuing a past practice of paying its employees a Christmas bonus in 1995.[2]

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

The Union has been the collective-bargaining representative of Respondent's shipping and receiving and production employees since about 1986. The most recent contract was a 3-year agreement that expired on January 14, 1996; subsequently, the parties entered into a Memorandum of Agreement dated May 10, 1996, that was to be effective for 3 years. The complaint alleges that by custom and as a matter of established past practice, the Respondent annually paid to unit employees wages in the form of a Christmas bonus. The Respondent, in its answer, admitted that Respondent has paid Christmas bonuses in the past, and the evidence establishes that Respondent did pay Christmas bonuses to its unit employees in 1991, 1992, 1993, 1994, and 1996. The range of these Christmas bonuses was from $25 to $500, but mostly in the $100 to $200 range, and the amount paid to particular employees was not, necessarily, identical from one year to the next. Respondent's president, Simon Garfinkel, testified that in December of the years in question, he looked over the Respondent's books to see how the Company operated that year. In addition, he looked at the attendance and performance of the Respondent's employees in determining how much of a Christmas bonus to give to each employee, and the bonuses were paid by company check, about a week prior to Christmas. All unit employees employed at the time that the checks were issued received a bonus; those who were absent, or were no longer employed by Respondent at the time received nothing. The only supplemental payment in December 1995 was a check for $250, a wedding gift, to one employee. Although this much is uncontradicted, there are credibility questions involving conflicts in the testimony of Charging Party's attorney, Nathaniel Charny, and the Respondent's representative, Mark Portnoy, about discussions that they had about the Christmas bonuses on November 2, 8, and 15.

The first negotiating session was held on November 2; Charny testified that, on that day, immediately prior to the commencement of the formal negotiations, he discussed several ''housekeeping matters'' with Portnoy. In this regard, he asked Portnoy to assure him that the Christmas bonus would be paid in 1995, as it had been paid in the past, even though the parties were engaged in contract negotiations. Portnoy said that he would talk to Garfinkel, who did not attend any of the negotiations, and get back to him. G. L. Tyler, business agent for the Union, testified that he was present on November 2 when, prior to the actual negotiations, Charny asked Portnoy if the Christmas bonuses were going to be paid that year and Portnoy said that he would get back to them. Marcelino Veras, an employee of Respondent and a member of the Union's negotiating committee, testified that he was present on about November 2 when Charny asked Portnoy if he was going to have a Christmas bonus in 1995. Portnoy answered that he would have to ''ask Mr. Si about it.'' Portnoy testified that at the November 2 meeting, Charny asked him whether the Respondent had made a determination as to what would happen with the Christmas bonus that year, saying that he considered it a past practice. Portnoy answered that the past practice was that it was under the unilateral discretion of the Respondent, but that he would be happy ''to talk to you about it, put it on the table, or make a demand, and let's discuss it.'' Charny responded that he did not want it to be part of the negotiations, ''and I don't want an answer. I will, however, inform the Union that it's actionable.'' Charny denies these statements attributed to him by Portnoy. Portnoy further testified that he does not remember whether this conversation took place prior to the bargaining session or at the start of the session. In answer to questions from counsel for the General Counsel, Portnoy testified that he does not recall whether he had been familiar with Respondent's prior practice of paying its employees Christmas bonuses or whether he first learned of it on November 2. He also testified, however, that when negotiations commenced in November, he ''knew that bonuses had been paid at times in the past.'' Sometime during the November negotiations, he told Garfinkel that the Union was asking whether the Christmas bonus would be paid in 1995. He testified: ''Mr. Garfinkel never gave me an answer as to whether the bonuses would be given or not . . . I don't recall his answers. His answers were—didn't lead me to draw a conclusion in either direction.'' Subsequent to this November 2 meeting, Charny asked him on one or two occasions ''if a decision had been made. And I told him, not to my knowl-

[1] Incorrectly alleged in the complaint as February 28, 1995.
[2] Unless indicated otherwise, all dates referred to herein relate to the year 1995.

edge.'' Bonnie Santosus, who began working for counsel for the Respondent on October 16, testified that she was told to follow Portnoy, to sit and listen and take notes. She took notes at the negotiation sessions between Respondent and the Union. During the November 2 negotiating session, Charny said to Portnoy that he expected the Christmas bonus to be paid regardless of the ongoing negotiations. Portnoy asked if that was a formal demand, and Charny said, ''[N]o, I don't expect an answer.'' Portnoy said that it was the Respondent's position that it was a unilateral decision by the Respondent and Charny said that he understood that, but it was his position that it was actionable before the Board. Portnoy asked: ''Is this a formal demand?'' Charny responded that it was not.

Charny testified that prior to the start of negotiations on November 8, he asked Portnoy if he had an answer to his question regarding the Christmas bonuses and Portnoy said that he had spoken to Garfinkel about it, but he did not know what Garfinkel would do, he would just have to wait and see. Tyler testified that, like the November 2 meeting, on November 8 Charny asked Portnoy if the Christmas bonus was going to be paid and Portnoy said that he would get back to them. Veras testified that at this meeting ''again, Mr. Charny asked Mr. Portnoy if we going to have a Christmas bonus.'' Portnoy said that he would have to get an answer from ''Mr. Si.'' Portnoy testified that he doesn't remember specific dates of other discussions with Charny about a Christmas bonus, but he does remember Charny saying, again, do you know if a decision has been made about the Christmas bonus. Charny testified that at the November 15 meeting, he again raised the subject of Christmas bonuses prior to the actual commencement of bargaining, and Portnoy said that he did not know what Garfinkel would do. Tyler testified that Charny told Portnoy of the possibility of a Board charge being filed if the bonuses were not paid, and Portnoy said that he did not have an answer. Veras testified that Charny asked Portnoy, for the third time, if the employees would receive a Christmas bonus, and Portnoy said that he had not yet gotten an answer from Garfinkel. Charny testified that he was regularly in contact with Portnoy after November 15 on a number of issues involving the Respondent and, on each of those occasions, he told Portnoy: ''Mark, come on, tell me he's going to pay bonuses, he has to.'' Portnoy always answered that he did not know what Garfinkel was going to do. It was not until January or February that Charny learned from either Tyler or Veras that the bonus was not paid. Portnoy testified that he had a number of telephone conversations with Charny after the November 15 meeting where Charny asked him whether Respondent had decided whether it was going to pay the Christmas bonus in 1995 and he answered that he did not know. Portnoy learned that the Christmas bonus was not paid, sometime after the fact.

IV. ANALYSIS

It is clear that the Respondent paid a Christmas bonus to all of its unit employees in 1991, 1992, 1993, 1994, and 1996. The amount paid was determined solely by Garfinkel and differed among the employees and was often different for individual employees from year to year. There have been numerous cases beginning with *NLRB v. Katz*, 369 U.S. 736 (1962), wherein the Board and the courts have found that the unilateral change in terms and conditions of employment violates Section 8(a)(1)(5) of the Act, and a good example is *Daily News of Los Angeles*, 315 NLRB 1236 (1994). A large number of these cases involve the unilateral discontinuance of periodic wage increases, but the instant matter involving the unilateral discontinuance of a Christmas bonus is certainly comparable. In *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970), the court stated:

> The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.
>
> In other words, whenever the employer by promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse during . . . the period of collective bargaining. Both unprecedented parsimony and deviational largess are viewed with a skeptic's eye during . . . bargaining. In those cases where the employer was found guilty of an unfair labor practice for withholding benefits during...the process of collective bargaining, the basis of the charge was a finding that the employer has changed the established structure of compensation. [Emphasis in the original.]

In similar fashion, the Respondent herein would be forbidden from unilaterally discontinuing the yearly Christmas bonuses if it had become an established practice and a term and condition of employment. Respondent had granted its employees a Christmas bonus for the 4 years prior to 1995. *Gas Machinery Co.*, 221 NLRB 862 (1976), and *Laredo Coca Cola Bottling Co.*, 241 NLRB 167, 173 (1979), are right on point in finding that the unilateral discontinuance of a Christmas bonus violates Section 8(a)(1) and (5) of the Act. In *Laredo*, the employer had been paying a Christmas or yearend bonus for 2 or 3 years. The administrative law Judge, cited *Nello Pistoresi & Son*, 203 NLRB 905 (1973), where the Board found that Christmas bonuses are sufficiently regular or consistent to wages if paid in two successive years, stating that the fact that the bonus is based upon subjective considerations, such as is true in the instant matter, is not dispositive:

> What is crucial in determining whether a bonus is part of the wage structure rather than a gift is the determination whether, by course of conduct or otherwise, Respondent has justified its employees' expectations that they would receive the bonus as part of ''wages.''

The facts herein establish that the employees, who had received the Christmas bonus for the prior 4 years, were reasonably justified in expecting that it would be paid in 1995 as well.

Respondent defends herein that there was no violation herein because Charny refused Portnoy's offer to bargain about the subject and the Union, therefore, waived its right to bargain about the subject. In order to make this finding I would have to credit Portnoy's testimony in this regard, and I cannot do so. I found Portnoy to be an evasive and not a very credible witness; in addition, I found that his testi-

mony was not very believable. On the other hand, I found Veras, Tyler and, to a lesser extent, Charny to be more credible, and I credit their testimony. I, therefore, find that at each of the three meetings Charny asked Portnoy for some assurances that the Christmas bonus would be paid in 1995 and Portnoy responded that he would talk to Garfinkel and get back to him, but never did. Further, I do not credit Portnoy's testimony that he offered to negotiate about the Christmas bonus, but that Charny refused. An example of why I found Portnoy's testimony not credible is, his testimony that Charny told him that he did not want an answer. In making credibility determinations, among other things, I look to probability and reasonable interpretations of events. I find it unreasonable that Charny would ask Portnoy a question and subsequently say that he does not want an answer to the question. I, therefore, reject the Respondent's defenses herein, and find that by unilaterally failing and refusing to pay a Christmas bonus to its unit employees in 1995, the Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time shipping, receiving and production employees and excluding all executives, office workers, salesmen, confidential employees, foremen, guards, professional employees and supervisors as defined in the Act.

4. By unilaterally failing and refusing to pay a Christmas bonus to its unit employees in 1995, the Respondent violated Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that Respondent unilaterally failed to pay the 1995 Christmas bonus, I shall recommend that Respondent shall cease and desist from engaging in such conduct. As the Respondent did pay the 1996 Christmas bonus, the principal remedy herein shall be designed to correct the 1995 situation. This intention is not thwarted by the fact that a formula was not used in determining the Christmas bonuses or that the amount due to each employees bonus is not presently calculable. Rather, I shall recommend that Respondent be ordered to reimburse each of its unit employees for the loss that they suffered due to Respondent's failure to pay the 1995 Christmas bonus. As the Board stated in *Pistoresi*, supra at 906: ''We are not required at this stage of the proceeding to decide the detailed formula to be used in determining the amounts of compensation due to the employees; the formula to be used in fixing the amount of compensation can be determined by agreement of the parties or, if necessary, in a backpay proceeding.''

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Sykel Enterprises, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union with respect to the discontinuance of any wage or other term or condition of employment of employees in an appropriate unit by failing first to give prior notice and an opportunity to bargain to the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole its employees in the appropriate unit for any monetary losses they suffered by reason of Respondent's unilateral failure and refusal to pay the 1995 Christmas bonuses, as set forth above in the remedy section of this decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount due herein.

(c) Post at its office and place of business in New York, New York, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain in good faith with Local 819, International Brotherhood of Teamsters, AFL–CIO (the Union) as the exclusive collective-bargaining representative of our employees in the appropriate unit concerning Christmas bonuses and other terms and conditions of employment by unilaterally discontinuing Christmas bonuses without adequate notice and opportunity to bargain with respect thereto being afforded the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of all our employees in the appropriate unit which is:

> All full-time and regular part-time shipping, receiving and production employees and excluding all executives, office workers, salesmen, confidential employees, foremen, guards, professional employees and supervisors as defined in the Act.

WE WILL make whole the employees in the appropriate unit for any monetary losses they may have suffered by reason of our unilateral termination of the 1995 Christmas bonus.

SYKEL ENTERPRISES, INC.